90-1776

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Pamalee Chambers,
Petitioner

v.

Southwestern Bell Telephone Company,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUE PRESENTED

Whether the court of appeals erred in retroactively appiying *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) to bar petitioner's § 1981 claim for retaliation: (a) when petitioner's employer intentionally concealed the basis of a Title VII claim, inducing petitioner to forego her Title VII complaint, (b) when petitioner did not know that her discharge was based on retaliation until after her Title VII remedies were foreclosed, and (c) when petitioner will suffer injustice by having no remedy after a jury has determined that her discharge was in retaliation for filing a Title VII complaint?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeals insofar as review of its judgment is sought.

TABLE OF CONTENTS

ISSUE PRESENTED i

LIST OF PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

DECISIONS BELOW 1

STATEMENT OF JURISDICTION 1

STATUTE INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

Patterson should not be applied retroactively because the requirements of *Chevron* have been met. 3

A. *Patterson* established a new principle of law. . . 4

B. Nonretroactive application of *Patterson* will not retard its effect. 4

C. Application of *Patterson* will result in injustice. 6

CONCLUSION 8

APPENDIX A 9

APPENDIX B 13

TABLE OF AUTHORITIES

Page(s)

Cases

Carter v. South Central Bell, 912 F.2d 832 (5th Cir. 1990) 4

Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) 3, 4, 7

Goff v. Continental Oil Co., 678 F.2d 593 (5th Cir. 1982) 5, 7, 8

Goodman v. Lukens Steel Co., 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987) 5

Griffin v. Illinois, 351 U.S. 12, 26, 76 S.Ct. 585, 100 L.Ed 891 (1956) 7

Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984) 8

Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805 (5th Cir. 1990) 4

Northern Pipeline Construction v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) 7

Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) . . . . . i, 2, 4, 6

Sanders v. Dobbs House, Inc., 431 F.2d 1097 (5th Cir. 1970) 4

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 1

DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 917 F.2d 5. It is reproduced in the appendix. The decision of the district court is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals (App. A, infra pp. 9 - 12) was entered on November 14, 1990. A petition for rehearing was denied on February 14, 1991 (App. B, infra p. 13 - 14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioner, Pamalee Chambers, filed this employment discrimination suit for retaliatory discharge against respondent, Southwestern Bell Telephone Company. The case was tried to a jury under 42 U.S.C. § 1981. The trial court entered a judgment for the plaintiff from which both parties appealed.

After the entry of judgment, this Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), which, if applied to this case, would limit the scope of § 1981 to exclude plaintiff's claim. Applying *Patterson* retroactively, the Court of Appeals for the Fifth Circuit reversed the decision of the trial court. Petitioner's petition for rehearing was denied.

SUMMARY OF THE ARGUMENT

Petitioner's case meets the criteria of *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) to avoid a retroactive application of *Patterson*. Under *Chevron's* three elements, *Patterson* first represents a new principle of law. Second, the rule established in *Patterson* will not be retarded by a nonretroactive application of its decision. Third, application of *Patterson* to this case would result in gross injustice and unfairness because Chambers relied upon established precedent in bringing her claim under § 1981.

Chambers' situation is different from that presented in *Patterson*. Whereas Patterson sought relief for racial harassment, Chambers' cause of action was based on retaliation for filing a Title VII complaint. In *Patterson*, no Title VII complaint was involved at any stage of the case, and the Court did not know why Patterson failed to file a Title VII claim. In

the present case, Chambers filed both a Title VII administrative complaint and a Title VII cause of action.

ARGUMENT

Patterson should not be applied retroactively in this case because the requirements of _Chevron_ have been met.

Whether a decision is to be applied retroactively requires consideration of three factors. As stated in *Chevron Oil Company v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971):

> First, the decision to be applied nonretroactively must establish a new principle of law. . . . Second, it has been stressed that "we must *** weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further retard its operation." Finally, we have weighed the equity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-107. [Citations omitted]

A. _Patterson_ established a new principle of law.

The first *Chevron* test has clearly been met. In *Lavender v. V & B Transmissions & Auto Repair*, 897 F.2d 805 (5th Cir. 1990), the Court of Appeals for the Fifth Circuit held that *Patterson* established a new principle of law.

B. Nonretroactive application of *Patterson* will not retard its effect.

The second element of *Chevron* requires weighing the merits and demerits by looking at the prior history of the rule and whether nonretroactive application will retard its effect. While the Fifth Circuit Court of Appeals concluded in *Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990) that *Patterson* forecloses further consideration whether the purpose of the rule is best served by nonretroactive application, this Court has adopted a case-by-case approach in applying the *Chevron* criteria to determine retroactive application. *Chevron*, 404 U.S. at 108. The facts of this case warrant a nonretroactive treatment of *Patterson*.

The clear purpose of § 1981 is to deter racially motivated discrimination. By enacting Title VII in 1964, Congress intended to broaden the remedies available for employment discrimination. In *Sanders v. Dobbs House, Inc.*, 431 F.2d 1097 (5th Cir. 1970), the Fifth Circuit Court of Appeals held "that the specific remedies fashioned by Congress in Title VII were not intended to preempt the general remedial language of §1981." 431 F.2d at 1101.

Prior to *Patterson*, the Fifth Circuit had no doubt that § 1981 was a broadly remedial statute and embraced a wide range of claims:

> We hold that §1981 does encompass claims of retaliation when an adverse action is taken in response to a person's filing an EEOC charge or civil rights lawsuit in which racial discrimination is alleged. The ability to seek enforcemnent and protection of one's right to be free of racial discrimination is an integral part of the right itself.

Goff v. Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982).

The Court has recognized that reliance on precedent is a basis for applying the doctrine of nonretroactivity. In *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987), the Court reviewed another case concerning a statute of limitations. The Court refused to apply the nonretroactivity doctrine because there was no established precedent in the circuit on which petitioners could have relied.

Chambers was discharged for filing a Title VII complaint. Before the *Patterson* decision and in accord with *Goff*, she was entitled to seek relief under either Title VII or § 1981. Retroactive application of *Patterson* will allow the retaliatory discharge to go unpunished. This result cannot further the intent expressed by Congress to deter racially motivated discrimination in Title VII.

Allowing petitioner to proceed with her retaliatory claim under the earlier interpretations of § 1981 will serve the purposes of Title VII and can have little effect upon the prospective application of *Patterson* to cases in which litigants have notice of its holding. In this case nonretroactive application of *Patterson* will not retard its effect.

C. Application of *Patterson* will result in injustice.

The Court of Appeals for the Fifth Circuit erroneously found that Chambers' situation was similar to that presented in *Patterson* and held her claim to be barred by that decision. Unlike the facts of *Patterson*, Chambers pursued both a Title VII administrative complaint (the reason why she was discharged) and a Title VII cause of action (abandoned in the pre-trial order in favor of the § 1981 remedy at a time when *Goff* was still the law).

In *Patterson*, the Court held that § 1981 did not cover a claim of racial harassment. Patterson did not file a Title VII administrative complaint or cause of action. The Court

commented "we do not know why petitioner chose to pursue only remedies under §1981, and not under Title VII." 109 S.Ct. at 2375. In *Patterson*, the Court did not consider whether its decision should be applied retroactively under the criteria of *Chevron*.

In this case, Chambers did not ignore her rights under Title VII. She filed a Title VII administrative complaint against her supervisors in respondent's Corpus Christi office. She accepted a transfer to Austin and became convinced by her new supervisors that her "troubles were over". After her discharge, however, Chambers discovered a secret "poison" memo in her personnel file written in retaliation for her filing the Title VII complaint. At the time of her discovery, however, pursuit of a Title VII remedy was barred by limitations. Respondent's concealment of the "poison" memo has shielded respondent from liability and allowed it to benefit from its retaliatory discrimination.

Chambers originally filed a Title VII cause of action in addition to a cause of action under § 1981. Relying upon the Fifth Circuit's decision in *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), Chambers abandoned her Title VII remedies in the pre-trial order. She proceeded to trial on the established proposition that § 1981 supported the recovery of damages for a Title VII retaliatory discharge.

Chambers' situation is similar to that of Huson in *Chevron*. In that case, the Court recognized that Huson did not or could not foresee that the consistent interpretation of the law would be overturned. In *Chevron*, the Court quoted Justice Frankfurter, "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." 404 U.S. at 108 (quoting *Griffin v. Illinois*, 351 U.S. 12, 26, 76 S.Ct. 585, 594, 100 L.Ed 891 (1956).

In *Northern Pipeline Construction v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the Court found the broad grant of judicial authority to bankruptcy judges in the Bankruptcy Act of 1978 to be unconstitutional. The Court applied *Chevron* and determined that all three tests supported nonretroactive application. The Court stated:

> retroactive application would not further the operation of our holding, and would surely visit substantial injustice upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts.

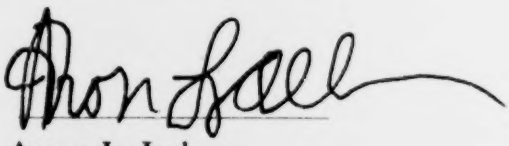
458 U.S. at 89, 102 S.Ct. at 2880.

Chambers is no less a litigant who has relied upon a statute to her detriment. Chambers was entitled to rely upon the established judicial interpretation that § 1981 covered claims for retaliatory discharge arising from the filing of a Title VII complaint. The Fifth Circuit Court of Appeals had repeatedly held that § 1981 was more than a remedial statute. *Goff*, supra; *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984). To hold her suit now to be barred upon a retroactive application of *Patterson* would work a rude injustice to her.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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APPENDIX A

Pamalee Chambers,
Plaintiff-Appellee,
Cross-Appellant,
v.
Southwestern Bell Telephone Company,
Defendant-Appellant,
Cross-Appellee

No. 89-8074

In the United States Court of Appeals,
Fifth Circuit
November 14, 1990

Before **Rubin, Garwood,** and **Higginbotham**, Circuit Judges
PATRICK E. HIGGINBOTHAM, Circuit Judge:

Southwestern Bell Telephone Company appeals a judgment for Pamalee Chambers on a claim under 42 U.S.C. § 1981 that her dismissal was in retaliation for filing complaints under Title VII of the 1964 Civil Rights Act. We find that § 1981 does not reach Bell's alleged conduct, and reverse the judgment.

I.

In January and May of 1984, Pamalee Chambers filed two complaints with the EEOC in Corpus Christi, Texas, alleging racially discriminatory harassment by her supervisor. This supervisor and two others allegedly retaliated by inserting critical evaluations into Chambers' personnel file. In June of 1984, Cambers transferred to the Austin office of Bell, and on October 25, 1985, Bell dismissed her, Bell says for placing harassing telephone calls while at work.

Chambers sued Bell on December 1, 1986, claiming that Bell fired her in retaliation for her earlier EEOC complaints. Her original complaint stated claims under both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and § 1981, but Chambers abandoned her Title VII claim.

On January 30, 1989, Bell moved to stay proceedings pending the Supreme Court's decision in *Patterson v. McLean*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). The district court denied the motion, citing judicial economy and an already lengthy delay. On March 9, 1989, a jury found that Bell had retaliated against Chambers. Bell now appeals to this court arguing that *Patterson* bars the claim and that the evidence is insufficient to support the verdict.

II.

In *Patterson v. McLean*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132, the Supreme Court limited the reach of § 1981 to conduct involving the making or enforcing of contracts and affirmed the dismissal of a racial harassment claim. The court rested on the language of § 1981 and the need for harmony with the conciliation procedures of Title VII. Bell urges us to apply *Patterson* retroactively and vacate the damages awarded to Chambers.

In *Carroll v. General Accident Ins. Co. of America*, 891 F.2d 1974 (5th Cir. 1990), *Lavender v. V & B Transmissions and Auto Repair*, 897 F.2d 805 (5th Cir. 1990), and *Carter v. South Central Bell*, 912 F.2d 832, 833 (5th Cir. 1990), we observed the general rule that an appellate court applies the law in effect at the time of its decision and evaluated the effect of retroactive application in light of the considerations set forth by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). We found that although *Patterson* established a new principal of law, retroactive application better served the

purpose of § 1981 and Title VII and did not result in substantial inequities.

Like the plaintiffs in *Lavender* and *Carter*, Chambers did not rely on § 1981 in foregoing her Title VII claim, but she adds on additional twist. She contends that we should not apply *Patterson* retroactively to her § 1981 claim because *Bell* foreclosed her Title VII claim by telling her that her personnel file contained favorable reports when in fact the file contained critical reports. The result is said to be that the timing of permitted file reviews by employees prevented her from discovering the allegedly retaliatory reports in time to pursue a Title VII claim. Assuming this to be true, it would offer no comfort to Chambers. The law before *Patterson* had no lulling role here, and the absence of a Title VII remedy in a given case works no corresponding expansion of § 1981. *Compare Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 723 (2d Cir. 1990) (stating that *Patterson* did not imply that § 1981 has a broader scope for contracts not actionable under Title VII). Every circuit addressing the issue has applied Patterson retroactively without regard to the merit of a parallel claim under Title VII. *See Bailey v. Northern Indiana Pub. Service Co.*, 910 F.2d 406 (7th Cir. 1990); *Gonzalez*, 909 F.2d at 716; *McKnight v. General Motors*, 908 F.2d 104 (7th Cir. 1990); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845 (9th Cir. 1990); and *Matthews v. Freedman*, 882 F.2d 83 (3d Cir. 1989).

Since *Patterson*, this circuit and others have seen *Patterson* as a bar to a variety of postformation conduct. In *Carroll*, 891 F.2d at 1174, we held that *Patterson* precluded recovery for discriminatory treatment and constructive discharge under § 1981. Similarly, in *Lavender*, 897 F.2d at 805, we held that *Patterson* barred a discriminatory discharge claim under § 1981. We most recently applied Patterson's bar to a retaliatory discharge claim in *Carter*, 912 F.2d at 839-40. See also *Gonzalez v. Home Ins. Co.*, 909 F.2d 716 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 103 (7th Cir. 1990); and

Courtney v. Canyon Television and Appliance Rental, 899 F.2d 845 (9th Cir. 1990). *But see Hicks v. General Motors Corp.*, 908 F.2d 104 (8th Cir. 1990); and *Kriegel v. Home Ins. Co.*, 739 F.Supp. 1538 (N.D.Ga. 1990).

Unlike constructive and discriminatory discharges, retaliatory discharge may implicate the right to enforce contracts. Retaliation or threats of retaliation calculated to deter the legal enforcement of contractual rights falls within the express ambit of § 1981. *Patterson*, 109 S.Ct. at 2373. The rub is that Chambers' claim is that Bell retaliated for her asserting rights under Title VII. We reaffirm our recent decision in *Carter*, guided by the Supreme Court's statement that "the right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee's ability to enforce through legal processes his or her established contract rights." *Patterson*, 109 S.Ct. at 2373 (emphasis added). *See McKnight v. General Motors Corp.*, 908 F.2d 104, 111-12 (7th Cir. 1990); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir. 1990); and *Overby v. Chevron USA Inc.*, 884 F.2d 470 (9th Cir. 1989). *But see Jordan v. U.S. West Direct Company*, 716 F.Supp. 1366 (D.Colo. 1989). Title VII provides an express remedy for employer conduct in retaliation for pursuing rights created by Title VII. See 42 U.S.C. § 2000e-3(a).

Because we find that *Patterson* bars Chambers' § 1981 claim, we do not review the sufficiency of the evidence. The judgment is **REVERSED**.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-8074

PAMALEE CHAMBERS,

Plaintiff-Appellee
Cross-Appellant,

versus

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant-Appellant-
Cross-Appellee.

Appeal From the United States District
Court for the Western District

ON PETITION FOR REHEARING
(FEBRUARY 14, 1991)

Before RUBIN, GARWOOD, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

Plaintiff's new counsel attempts to avoid the application of *Patterson v. McLean*, 109 S.Ct. 2363 (1989). The argument is

that in declining to give prospective effect to *Patterson* in this case, we overlooked plaintiff's circumstances; that she was misled by defendant, and, unlike Patterson, was prevented from pursuing her Title VII case by defendant. We are not persuaded that this is a difference that controls *Patterson's* applicability to this case. The petition for rehearing is **DENIED**.

ENTERED FOR THE COURT:

_____

United States Circuit Judge